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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 655

Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

JOSEPH THOMAS MULLOY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND CENTRAL COMMITTEE FOR CONSCIENTIOUS OBJECTORS, *AMICI CURIAE*

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Interest of Amici*

Interest of American Civil Liberties Union

For half a century the American Civil Liberties Union has defended the fundamental rights afforded by the Bill of Rights. In particular, it has represented those who have asserted the rights of conscience and religious liberty protected by the First Amendment and the right to due process of law as guaranteed by the Fifth Amendment, against governmental infringement. Indeed, the ACLU was

* Written consents by the attorneys for both parties have been filed with the Clerk.

founded in the crucible of the First World War to defend the rights of conscientious objectors.

In accord with our commitment to the protections of conscience and due process the ACLU is now heavily engaged in the representation of young men charged with alleged violations of the draft laws. As one Federal Court has recently stated, "Those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).

We file this brief in order to present to the Court our arguments of law which support those principles.

Interest of the Central Committee for Conscientious Objectors

The Central Committee for Conscientious Objectors (CCCO) is a non-profit service organization founded in 1948 to assist persons who find themselves facing conflict with the power of the State as a result of conscientious objection to participation in war. In 1968, amicus counseled over 10,000 young men with problems relating to compulsory military service. The counseling services are national in scope; CCCO has, aside from its headquarters in Philadelphia, regional offices in San Francisco and Chicago. In addition, CCCO has cooperating counselors and cooperating attorneys in every state and is widely recog-

nized as one of the most expert and experienced draft counseling agencies. Of the registrants counseled by CCCO in 1968, the majority were considering or seeking conscientious objector status or student, medical, hardship or other deferments.

CCCO charges no fees for its services to registrants, attorneys, or any other persons. Its views on various questions relevant to its expertise have, from time to time been solicited by officials of the Selective Service System and by members of Congress.

Because the procedures relating to the question of reopening a Selective Service classification are involved and complex, CCCO devotes a substantial amount of time—preparation of memoranda, responding to telephone and mail inquiries, and direct counseling—to these activities. CCCO has counseled and continues to counsel numerous conscientious objectors. CCCO, thus has a direct interest in preserving the rights of these religious objectors.

Questions Presented

1. Whether the Courts below erred in holding that petitioner was not entitled to a reopening of his classification?

2. Whether the Courts below erred in holding that a *de facto* reopening of petitioner's classification did not take place?

3. Whether the Court of Appeals applied an improper standard of judicial review in determining if petitioner was entitled to a reopening of his classification?

Statement of the Case

On October 17, 1967, petitioner, then twenty-three years old, wrote a letter to his Selective Service Local Board No. 47, Louisville, Kentucky, which read in pertinent part, "after much, much thinking, seeking and questioning of my own religious upbringing and political experience I have concluded that I am a conscientious objector and I am therefore opposed to war in any form" (A. 41).*

In response to this letter, the local board sent him a Special Form for Conscientious Objectors (SSS Form 150), which he completed and returned on October 26, 1967. He gave detailed answers to the questions on the form, stating among other things that he believed in a Supreme Being and that to be a member of the Armed Forces of any country would oblige him to kill or indirectly assist in killing (A. 19). Additionally, various letters, including one from a Catholic priest, were submitted to the board in support of petitioner's request for deferment as a conscientious objector.

This case does not involve the special questions inherent in a post-induction order application for conscientious objector classification. See *United States* v. *Gearey*, 368 F.2d 144 (2nd Cir. 1966) *(Gearey I)* and *United States* v. *Gearey*, 379 F.2d 915 (2nd Cir. 1967) *(Gearey II)*. Both at the time that petitioner advised his local board that he was a conscientious objector, and at the time that he filed his SSS Form 150, petitioner had not been ordered to report for induction.

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* All references (A. —) are to petitioner's Appendix.

In response to petitioner's request for an appearance before the board, a "courtesy interview" was held on November 9, 1967. The meeting lasted between ten and fifteen minutes (A. 77). The Chairman of the board stated "at that time the Board came to the conclusion that there was no merit to his contention that he was entitled to conscientious objector status." An entry was made on his Classification Questionnaire on November 9th, stating "Classification was not reopened" (A. 14). The board, however, did not take a vote at the meeting of November 9th. On November 12, 1967, petitioner wrote a letter to the board setting forth his views more fully (A. 58). It was this letter which, according to the Court of Appeals, "indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

On January 11, 1968, the board formally considered petitioner's claim for classification, and by a vote of 4-0 took the following action as noted in the Classification Questionnaire: "All information in file was considered including claim of Conscientious Objector. All Members present felt this information did not warrant re-opening of 1A class" (A. 14). On January 21, petitioner wrote to the board, appealing from the board's failure to reclassify him in Class 1-O stating that he considered his case to have been reopened. The board wrote in reply two days later that it did not consider his case to have been reopened and that he had no right to appeal (A. 64, 65). On the same date he received an order to report for induction on February 23, 1968.

On February 8, 1968, petitioner filed a civil action in the United States District Court for the Western District of Kentucky, seeking to enjoin his induction into the Armed Forces on the ground that the order to report for induction was void, as having been issued in violation of applicable Selective Service Regulations and in such circumstances as to violate due process of law. On February 16, 1968, the Court dismissed his complaint and denied relief. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on February 16, 1968, together with a motion for an interlocutory injunction pending appeal. The latter motion was denied on February 22, 1968. On February 23, 1968, the petitioner reported to the induction station but refused to submit to induction into the armed forces. The appeal in the civil case was dismissed as moot by the Court of Appeals on May 2, 1968. The petitioner was thereafter indicted, tried and convicted.

ARGUMENT

I.

Since petitioner made out a prima facie claim for conscientious objector status, he was entitled to a reopening of his classification.

The Court of Appeals in every judicial circuit in the United States, including the Sixth, has held that where a registrant presents new facts to his local board not previously considered and those facts, if true, would entitle him to reclassification, then the local board is compelled to reopen his classification.[1] See 32 C.F.R. 1625.2.

While the several Courts of Appeals have varied somewhat in defining the prima facie case for a requested classification which will trigger the reopening process,

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[1] See *United States* v. *Stoppelman*, 406 F.2d 127 (1st Cir. 1969); *United States* v. *Gearey*, 379 F.2d 915, fn. 11 (2nd Cir. 1967) adopting the standard enunciated in *United States* v. *Burlich*, 257 F. Supp. 906, 911 (S.D.N.Y. 1966); *United States* v. *Turner*, —— F.2d ——, No. 17685 (3rd Cir. Feb. 10, 1970) following *United States ex rel. Berman* v. *Craig*, 207 F.2d 888 (3rd Cir. 1953); *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *Robertson* v. *United States*, 404 F.2d 1141 (5th Cir. 1969) rev'd *en banc* on other grounds 417 F.2d 440; *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956); *United States* v. *Freeman*, 388 F.2d 246 (7th Cir. 1967); *Davis* v. *United States*, 410 F.2d 89 (8th Cir. 1969); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *Owens* v. *United States*, 396 F.2d 540 (10th Cir. 1968).

Indeed some courts have found the right to a reopening of one's classification upon the presentation of new facts not previously considered so strong that the action of a local board in refusing to reopen was so "basically lawless" as to warrant pre-induction judicial review. See *Hunt* v. *Local Board*, —— F.2d —— (3rd Cir. No. 18076 March 24, 1970); *Barker* v. *Hershey*, 2 SSLR 3390 (W.D. Wisc. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969).

amici believe the test carefully enunciated by Judge Weinfeld in *United States* v. *Burlich*, 257 F. Supp. 906 (S.D.N.Y. 1966) and adopted by the Second Circuit in *Gearey II*,[2] *supra*, properly states the definition of a prima facie case for reopening:

> "A prima facie case is made out if a registrant has presented facts which, if true and uncontradicted by other information contained in his file, would be sufficient under the regulations to warrant granting his reclassification." 257 F. Supp. at 911.

See also *United States ex rel. Wilkerson* v. *Commanding Officer*, 286 F. Supp. 290 (S.D.N.Y. 1968); and see Hershey, *Legal Aspects of Selective Service*, 36 (1969).

Only one month after petitioner's local board refused to reopen his classification, the General Counsel of the Selective Service System stated an unequivocal reopening policy that is considerably broader than the prima facie standard of *Burlich* and *Gearey II*.

> "In every case in which a claim of conscientious objection is filed by a registrant prior to the issuance of an induction order, it has been the consistent policy of the Director to require reopening of such registrant's classification."

1 SSLR 22 and 25, reporting a letter of Feb. 21, 1968 to the Massachusetts State Director of Selective Service. See

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[2] Unlike *Gearey*, however, this case does not involve the issue of a local board's refusal to reopen a registrant's classification after a registrant has been mailed an order to report for induction.

also Selective Service *Local Board Memorandum* 41 as amended July 30, 1968, reported at 1 SSLR 2174.[3]

Thus the essential question is whether the record reveals that petitioner met the basic requirements of a conscientious objector claim.

While petitioner, as any registrant, must do more than state baldly that for conscientious reasons he is opposed to participation in war in any form, but cf. *United States* v. *Freeman, supra,* he is entitled to the presumptions in his favor implied by the term *prima facie.* He need not prove his case to the hilt as he would have to do if the case were already reopened.

> "In determining whether a prima facie case for reopening has been made out, the Court, in accordance with generally applicable legal practice, must construe the facts in a way most favorable to the registrant . . . the Board is required to reopen if a prima facie case is made out." Weinstein, J., *United States* v. *Baker,* 1 SSLR 3017; 3018 (E.D.N.Y. 1968).

Accord: *Murray* v. *Blatchford,* 307 F. Supp. 1038, 1055 (D.R.I. 1969); *United States* v. *Turner, supra; United States* v. *Freeman, supra.*

Petitioner demonstrated a strong religious background. He wrote a reasoned, detailed statement of his beliefs, which on its face were those of a classic conscientious objector, cf. *United States* v. *Seeger,* 380 U.S. 163 (1965); and were obviously rooted in his religious background.

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[3] In *United States* v. *Stout,* 415 F.2d 1190 (4th Cir. 1969), the Court held that administrative policy statements of the Selective Service System had the force of law.

He documented the substance of his beliefs as best he could by letters attesting to his sincerity. Surely no more can be required for a prima facie case.

If the standard for reopening is not to be equivalent to the standard of ultimate success in a conscientious objector application, petitioner's prima facie application must be held sufficient. In *United States* v. *Bryant,* 293 F. Supp. 922, 932 (N.D. Ark. 1968), the Court held:

> "A prima facie case was established when the defendant formally attested that he was conscientiously opposed to participation in war in any form, and persons knowing the defendant attested to his sincerity. No statement made by the defendant is in any way inconsistent with his professed belief."

See also *United States* v. *James,* 417 F.2d 826, 829 (4th Cir. 1969):

> ". . . it is perfectly clear that defendant's timely assertions to his local board, if believed, demonstrate that he was brought up in, and had embraced, the religious tradition of one of his parents, who belonged to a denomination, the members of which have consistently opposed participation in war. Defendant asserted his personal objections, in light of this tradition, to participation in war in any form. He thus presented a prima facie case for exemption." (Citations omitted.)

The Third Circuit recently reaffirmed its prior holding in *United States ex rel. Berman* v. *Craig,* 207 F.2d 888 (1953). In *United States* v. *Turner, supra,* the Court held that

> "the rule is well established that where one who has originally made no claim to conscientious objector

status and has been classified 1-A later seeks a conscientious objector status because of changed circumstances the board is required to reopen his classification if the claim which he has presented is adequate on its face, and only then may the board determine the merits of the claim.

There is a substantial reason which underlies the judicial doctrine. For if the request to reopen is granted the board must classify the registrant de novo and mail notice of the new classification to him, which then forms the basis for the registrant's right to appeal and appear personally before the board. On the other hand, when the board refuses to reopen a classification, there is no right of appeal. It would therefore be a denial of procedural due process if local boards prevented administrative appeal from a refusal to reclassify by casting it in the form of a refusal to reopen." *Turner, supra,* p. 2 (slipsheet opinion).

Judge Kalodner, in his concurring opinion, stated the rule even more bluntly:

"When a claim, in writing, for change in classification is presented by a draft registrant on grounds, which, if established by substantial proof, would entitle him to the change sought, a draft board is required to reopen and consider the existing classification so as to afford the registrant the due process right of appeal if his claim is denied." *Turner, supra,* p. 10 (slipsheet opinion).

The Court below disregarded all of these considerations and held that it is completely within the discretion of the

local board to make such investigation as it wishes of whether the new facts are true or false and then to decide to reopen or not to reopen based on its own unstated and undisclosed investigation and findings, if any. *United States* v. *Mulloy*, 412 F.2d 421, 423 (6th Cir. 1969). What the Court overlooks is the first principle of due process of law—that the most reliable way of searching for the truth where a citizen is before a government agency is through the hearing process—and that the most dangerous and least reliable way is by allowing the government agency to do it in secret and then announce its unappealable conclusion.

As the Second Circuit recognized in *United States* v. *Delfin*, 419 F.2d 226, 228 (2nd Cir. 1969):

> "Applications for classification as a conscientious objector present subtle questions difficult to resolve except upon the fullest consideration, and, as Congress recognized, fairness to the applicant requires that they not be disposed of in a summary manner."

The Board members plainly did not question petitioner's sincerity (A. 71, 72, 84, 86). The Court below does not cite a single instance in the record where the Board expressly or by implication questioned the sincerity of the claim. The basis for the holding below appears to be rather the Court's *own doubts* of petitioner's sincerity,[4] coupled with

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[4] The opinion below states that "the Board had the right to consider inconsistent statements made by the registrant as well as any fact which cast doubt on his veracity," 412 F.2d at 425, but the only reference to the trial record is the Board Chairman's testimony that Mulloy "did not make out a case for conscientious objection." *Ibid.* This is plainly no evidence of a Board finding of inconsistency or of a Board doubt of veracity. Then the opinion below mentions three items which "the Board had the right to take into account," *ibid.*, although there is absolutely no

the Court's erroneous view of the legal sufficiency of petitioner's religious beliefs:

> "Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views and his conscience rather than on religious training and belief." 412 F.2d at 425.

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evidence that the Board did so, and in any event none of them provides a legally sufficient ground for denial of conscientious objector status: (1) The registrant did not claim to be a conscientious objector when he registered at age 18, and only did so "when time was running out for him." *Ibid.* If the *Gearey* cases, *supra*, which the Court below cites approvingly, *id.* at 424, stand for anything it is that one need not declare himself as a conscientious objector at age 18 in order to be legally recognized as such, since conscientious objector views can genuinely crystallize at any time in a young man's development, even after the receipt of an induction order. Indeed, under the *Gearey* philosophy, it is error to reject a claim because it was asserted late rather than early in one's Selective Service history, and it is the plainest error to infer some disability, or to require a greater quantum of proof, for a young man who did not so declare at age 18. (2) The opinion below cites a letter written by petitioner's brother which stated that "he has maintained this position for a number of years." *Id.* at 426. But the letter could just as easily be referring to petitioner's overall idealistic views, or his general opposition to war, and, in any event, petitioner, who was classified II-S (college student) and II-A (occupational deferment) until May of 1967, was not obliged to inform the Board of his desire to be classified as a conscientious objector so long as he was entitled to any lower classification. See *United States* v. *Bornemann*, —— F.2d ——, No. 33716 (2nd Cir. Jan. 5, 1970). (3) The opinion below states that petitioner was incorrect in his assertion to the Board that he was subject to a $5,000 bond in a Federal Court proceeding. Amici are baffled as to what this has to do with the sincerity of a claim for conscientious objection. See *United States* v. *Rempel*, 220 F.2d 949 (10th Cir. 1955). Finally, amici must observe that an attitude of unseemly suspicion and hostility towards petitioner is reflected by the gratuitous statement that petitioner attempted to "fool" the Board and the District Court, *id.* at 426.

This Court, in *United States* v. *Seeger,* 380 U.S. 163 (1965) construed the statutory definition of a conscientious objector broadly. Thus it was held that " . . . any exception to it must be interpreted narrowly." 380 U.S. at 186.

> "[T]he use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but *which is the sole basis for the registrant's belief* and is in no way related to a Supreme Being." *Ibid.* (emphasis added).[5]

A mere comparison of petitioner's claim with his letter of November 17, 1967 demonstrates that there was indeed substantial religious content to his objection and thus the letter does not supply a basis in fact for the board's refusal to reopen, as the Court below held, *Seeger, supra.* See also *United States* v. *Levy,* 419 F.2d 360, 367-368 (8th Cir. 1969); *United States* v. *White,* —— F.2d ——, No. 26629 (5th Cir. Dec. 3, 1969); *United States ex rel. Brooks* v. *Clifford,* 409 F.2d 700, 708 (4th Cir. 1969); *Pitcher* v. *Laird,* —— F.2d ——, No. 28285 (5th Cir. Jan. 30, 1970); *Fleming* v. *United States,* 344 F.2d 912, 915 (10th Cir. 1965); *Bates* v. *Commanding Officer,* 413 F.2d 475, 479 (1st Cir. 1969); *United States* v. *Pence,* 410 F.2d 557, 562 (8th Cir. 1969); *Kessler* v. *United States,* 406 F.2d 151 (5th Cir. 1969).

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[5] The Court below implies that the Military Selective Service Act of 1967, which shortened the definition of conscientious objection so as to eliminate the requirement of belief in relationship to a Supreme Being, had the effect of cutting down this Court's holding in *Seeger.* If anything, a better argument can be made to the contrary. See *United States* v. *Levy,* 419 F.2d 360, 366 (8th Cir. 1969), which concludes that *Seeger* is unchanged by the amendment.

Petitioner made out a prima facie case for conscientious objector status[6] and the Court below erred in finding that the local board did not deprive him of due process when it refused to reopen his classification.

II.

A *de facto* reopening of petitioner's classification took place by reason of the scope and intensity of the local board's inquiry. The Court below erred in not finding that petitioner had therefore been illegally denied his rights of personal appearance and appeal attendant to such reopening.

It is well recognized by the courts, as well as by the Selective Service System, that a local board cannot make an evaluative determination upon the merits of a registrant's request for reclassification and then summarily refuse to reopen his classification. To do so would cut off his rights of personal appearance under 32 C.F.R. §1624 and appeal, 32 C.F.R. §1626. *Nothing prevents a local board from reopening a registrant's classification and then retaining him in 1-A status.* This procedure is expressly authorized by 32 C.F.R. §1625.11. At least, however, he is given the minimal due process safeguards of personal appearance and appeal which follow a reopening. 32 C.F.R. §1625.13.

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[6] The government seems to concede in its Brief in Opposition at page 18 that the "new information" which petitioner presented in the representations made in Form 150 and the accompanying letters did present a prima facie showing that he met the statutory conscientious objector standard. This was not the view of the Court below. See 414 F.2d at 426.

In the case at bar, the Court below held that the board could not only reach the merits of an applicant's request for deferment at the initial stage of determining whether or not to reopen, but in fact had a duty to reach the heart of the claim at such a preliminary stage. It is respectfully submitted that the Court below was in error.

Miller v. *United States,* 388 F.2d 973 (9th Cir. 1967), involved a registrant's request to reopen his classification on grounds of conscientious objection after receipt of an order to report for induction. Additionally, the State Director of Selective Service had given the local board permission to disregard the post-induction order restrictions of 32 C.F.R. §1625.2. The board considered the registrant's application and then refused to reopen.

The Ninth Circuit found that what the board actually did was to engage in an

> ". . . evaluative consideration and judgment that, regardless of the prima facie sufficiency of the information submitted, it was not, when probatively weighed against other elements in the situation entitled to credence as fact." 388 F.2d at 975.

The Court held that this amounted to a determination of the question of classification and that,

> "While the local board labeled what it has done as a denial of reopening in form, the substance of what it did was, as indicated, to consider the new information . . . received, weigh this against other probative factors, and then evaluatively concluded that appellant's previous 1-A classification was proper in the situation." 388 F.2d at 976.

In reversing appellant's conviction, the *Miller* court held that it was not

> "... validly possible for these [procedural] rights [personal appearance and appeal] to be cut off ... by a local board's choosing not to reopen, but to nevertheless engage in a similar consideration of the situation upon its merits, and then to accord to its classification result the status of a denial merely of the claimant's motion to reopen." 388 F.2d 976.[7]

See also *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *United States* v. *Clark*, 105 F. Supp. 613 at 615 (W.D. Pa. 1952).

A number of recent decisions have analyzed the issue of "de facto" reopening. Judge Weinstein, in *United States* v. *Baker*, 1 SSLR 3017 (E.D.N.Y. 1968) saw that,

> "... there was no difference between the way the [discretionary] interview was conducted and the way it would have been conducted had there been a reopening of this classification and a full review of the facts to determine sincerity."

And at 3019:

> "... a full inquiry and hearing of the registrant's contentions did take place even though it was designated an 'interview' and the local board panel may well have believed that it was only holding a hearing to decide if a reopening was required. *The panel's distinction be-*

[7] The Court below recognizes that the *Miller* decision supports petitioner's argument but fails to analyze or distinguish it. 412 F.2d at 425.

tween a regular meeting and a special meeting is of no significance. Under the circumstances . . . a reopening of the classification did occur as a matter of law." (Emphasis added.)

Identically, in *United States* v. *Westphal,* 304 F. Supp. 951 at 954 (D.S.D. 1969), the Court held that,

"... when the local board invited the registrant to appear before it in connection with his request for conscientious objector status, that was in effect a reopening of his classification ..."

The Fourth Circuit, in *Davis* v. *United States,* 410 F.2d 89 (1969), relying on *Robertson* v. *United States,* 404 F.2d 1141 at 1146 (5th Cir. 1969), *rev'd en banc on other grounds* 417 F.2d 440, held that the board improperly considered the issue of sincerity without first reopening the registrant's classification. Thus, having cut off the registrant's right to appeal on that crucial issue, the registrant was held to have been denied due process. See also *Lane* v. *Allen,* 307 F. Supp. 881 (N.D. Ohio 1969).

In *United States* v. *Melrose,* —— F. Supp. ——, Cr. 68-124s (D.S.D. December 4, 1969) the court held,

"... when the local board proceeded ... to review 'all the evidence in the file' including that submitted following its original classification, it has reached a determination on the merits through a de facto reopening of the defendant's classification. The action of the board in labeling its determination a decision not to reopen was a denial of the defendant's procedural rights." (Slipsheet opinion, p. 6.)

Judge Pettine, in his opinion in *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969), recognized the problem of a *de facto* reopening incurred by a board which followed the kind of rule urged by the Court of Appeals below.

> "... local boards may run four-square into the problem of determining the merits of a registrant's claim under the guise of determining whether his claim is *prima facie* sufficient [for a reopening]. This would constitute a de facto reopening ... If the local board goes beyond the information set forth in the registrant's statement, it is violating 32 C.F.R. 1625.4 and depriving the registrant of his rights to personal appearance and to an appeal." *Id.* at 1066.

Clearly, a "de facto" reopening occurred in the instant case. The board interviewed petitioner and indeed some members believed he was requesting an occupational deferment. His file was reviewed twice, once at the board's meeting of November 9, 1967 and again at the meeting of January 11, 1968. After the meeting the following notation was made in petitioner's Selective Service file:

> *"All information in file was considered* including claim of Conscientious Objector. All members present felt this information did not warrant reopening of 1-A class" (A. 14). (Emphasis added.)

Such a finding on the merits was characterized by the board as not amounting to a reopening, thereby cutting off petitioner's rights of personal appearance and appeal. The Court below compounded this error by ratifying the local board's action and apparently approving of the legal fiction

that a reopening in fact is not a reopening as a matter of law.

The Selective Service System itself has stated,

> "Where a local board complied with the essential requirements there was a reopening . . ." Hershey, *Legal Aspects of Selective Service,* 35 (1969).

See also this Court's discussion in *Witmer* v. *United States,* 348 U.S. 375 at 383-384 (1954) of what appeared to have been a "de facto" reopening of Witmer's classification with regard to his claim for a ministerial exemption.

While the board characterized its finding as a refusal to reopen petitioner's classification, the determination was in truth and fact a decision regarding the issue of classification itself, and thus a decision on the merits took place. The action was erroneously approved of by the court below. This "de facto" reopening should have invested petitioner with rights of personal appearance and appeal. 32 C.F.R. §1625.13, §1624, §1626. These rights having been withheld from petitioner after a "de facto" reopening of his classification, a violation of procedural due process occurred.

Legal fictions may have their utility, but it is a cruel and cynical doctrine which exalts form over substance and allows a man to be deprived of his liberty because an administrative agency arbitrarily chooses to use a label which will cut off his valuable procedural rights. A creature which looks like a cat, walks like a cat, eats like a cat, and purrs like a cat, is indeed a cat, even if some administrative agency calls it a dog. Amici respectfully urge that the court below did not heed the admonition of

Chief Justice Taft that courts should not be so blind that they refuse to recognize what all others can see. See *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922); *Gomillion* v. *Lightfoot*, 270 F.2d 594, 608 (5th Cir. 1959) (dissenting opinion by Circuit Judge Brown). It is, we submit, the duty of courts reviewing administrative action, to make certain "that the image of the administrative process is not transformed from a Rubens to a Modigliani." *Cinderella Career and Finishing Schools* v. *Federal Trade Commission*, 38 USLW 2517, 2518 (D.C. Cir. Mar. 20, 1970, Tamm, J.).

III.

The Court below erroneously applied the "basis in fact" test in determining whether petitioner was entitled to a reopening of his classification.

As stated at page 8, *supra*, amici believe the proper test of whether or not a registrant is entitled to a reopening of his classification is whether a registrant presents new facts which, "if true and uncontradicted by other information contained in his file, would be sufficient under the regulations to warrant granting his reclassification." *United States* v. *Burlich*, *supra*, at 911. Accord: *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *United States* v. *Powers*, 413 F.2d 834, 838 (1st Cir. 1969); *Howze* v. *United States*, 409 F.2d 27 (9th Cir. 1969); *Petrie* v. *United States*, 407 F.2d 267 (9th Cir. 1969), *en banc*; *United States* v. *Gearey*, 379 F.2d 915, 922 fn. 11. Additionally, a registrant is entitled to the presumptions in his favor implied by the term *prima facie*. *United States* v. *Freeman*, 388 F.2d 246 (7th Cir. 1967); *United States* v.

Baker, 1 SSLR 3017 (E.D.N.Y. 1968); *Murray* v. *Blatchford*, 307 F. Supp. 1038 (D.R.I. 1969).

In applying the "basis in fact" test, rather than the test enunciated in *Burlich, supra*, the Court erroneously made the standard for reopening equivalent to the standard of ultimate success on the merits. Additionally, the power of the courts to determine violations of procedural due process would be no greater than their power to determine the substantive validity of a classification. Cf. *Petrie* v. *United States*, 407 F.2d 267, 245 (9th Cir. 1969); *United States* v. *Ransom*, 223 F.2d 15 (7th Cir. 1955). See also *Mizrahi* v. *United States*, 409 F.2d 1219 (9th Cir. 1969).

Finally, the Court below in finding that a "basis in fact" existed on a ground other than that which the board found, violated the rule that the action of the board must be supported on the same grounds that it gave for such action. *Gatchell* v. *United States*, 378 F.2d 287 (9th Cir. 1967); *Owens* v. *United States*, 396 F.2d 540, 543 (10th Cir. 1968); *United States* v. *Hawley*, 2 SSLR 3113 (D. Minn. 1969); *Benway* v. *Barnhill*, 300 F. Supp. 483 (D.R.I. 1969); *United States* v. *Balderrama*, 304 F. Supp. 822 (W.D. Tex. 1969). See also *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943); *Crane* v. *Hendrick*, 284 F. Supp. 250 (N.D. Cal. 1968).

CONCLUSION

For the foregoing reasons, amici respectfully urge that the judgment below should be reversed.

Respectfully submitted,

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